

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

---

THE STATE OF ARIZONA,  
*Respondent,*

*v.*

JAMES M. GUTIERREZ,  
*Petitioner.*

No. 2 CA-CR 2019-0308-PR  
Filed July 29, 2020

---

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION  
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

---

Petition for Review from the Superior Court in Pinal County  
No. S1100CR201601942  
The Honorable Lawrence M. Wharton, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

---

COUNSEL

Kent P. Volkmer, Pinal County Attorney  
By Geraldine L. Roll, Deputy County Attorney, Florence  
*Counsel for Respondent*

Harriette P. Levitt, Tucson  
*Counsel for Petitioner*

STATE v. GUTIERREZ  
Decision of the Court

---

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

---

V Á S Q U E Z, Chief Judge:

¶1 Petitioner James Gutierrez seeks review of the trial court’s ruling denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.<sup>1</sup> We will not disturb that ruling unless the court has abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Gutierrez has not met his burden of establishing such abuse here.

¶2 After a jury trial in 2017, Gutierrez was convicted of possession of a dangerous drug, possession of drug paraphernalia, and resisting arrest. The trial court imposed concurrent prison terms, the longest of which was ten years. This court affirmed Gutierrez’s convictions and sentences on appeal. *State v. Gutierrez*, No. 2 CA-CR 2017-0387 (Ariz. App. June 7, 2018) (mem. decision).

¶3 Gutierrez initiated a proceeding for post-conviction relief, and the trial court appointed Rule 32 counsel. In his petition, Gutierrez asserted the state had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose disciplinary records for two officers involved in his arrest. He also argued that his trial counsel had rendered ineffective assistance by failing “to conduct any investigation into the officers’ backgrounds or to make any genuine effort to conduct an effective cross-examination.” Gutierrez attached to his petition three news articles—two from January 2019 and one from February 2013—discussing both on- and off-duty incidents involving one of the officers.

---

<sup>1</sup> Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). Because it is neither infeasible nor works an injustice here, “we cite to and apply the current version of the rules.” *State v. Mendoza*, No. 2 CA-CR 2019-0281-PR, n.1, 2020 WL 3055826 (Ariz. Ct. App. June 9, 2020) (“amendments apply to all cases pending on the effective date unless a court determines that ‘applying the rule or amendment would be infeasible or work an injustice’” (quoting Ariz. Sup. Ct. Order R-19-0012)).

STATE v. GUTIERREZ  
Decision of the Court

¶4 The trial court summarily denied the petition. It determined that Gutierrez’s *Brady* claim was precluded and that he had “failed to show that trial counsel’s performance fell below the objective standards.” As to the latter, the court noted that the January 2019 articles “could not have been known to trial counsel” during the 2017 trial and that “the discipline records of both officers that w[ere] available w[ere] disclosed and used by trial counsel.” This petition for review followed.

¶5 On review, Gutierrez reasserts his argument that the state violated the rule set forth in *Brady* and argues the trial court erred in finding his claim precluded. But a claim under *Brady* is a constitutional claim and therefore is cognizable under Rule 32.1(a). See *Brady*, 373 U.S. at 87 (suppression of evidence by state “of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment”). As such, a *Brady* claim is subject to preclusion pursuant to Rule 32.2(a)(3) if waived on appeal, as is the case here. No abuse of discretion occurred. See *Martinez*, 226 Ariz. 464, ¶ 6.

¶6 Gutierrez also repeats his claim of ineffective assistance of trial counsel. He contends the trial court erred in concluding that the information in the January 2019 articles could not have been known during the 2017 trial because the articles refer to incidents dating back to 2012. He also maintains that, “[a]ssuming” the disciplinary records of the officers were “readily discoverable,” his ineffective assistance of counsel claim is “essentially proven” because “evidence of both officers’ past history of wrongdoing would probably have resulted in the jury believing that the officers planted the evidence.”

¶7 “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). “Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim.” *Id.* Under the first prong of *Strickland*, “we must presume ‘counsel’s conduct falls within the wide range of reasonable professional assistance’ that ‘might be considered sound trial strategy.’” *State v. Denz*, 232 Ariz. 441, ¶ 7 (App. 2013) (quoting *Strickland*, 466 U.S. at 689). And under the second prong of *Strickland*, defendants cannot meet their burden by “mere speculation.” *State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999).

STATE v. GUTIERREZ  
Decision of the Court

¶8 Although Gutierrez is correct that the January 2019 articles discuss incidents dating back to 2012, they nonetheless do not inform our ineffective assistance of counsel analysis. Gutierrez has failed to explain how his trial counsel's conduct regarding the discovery of those incidents amounted to "ineptitude, inexperience or lack of preparation." *Denz*, 232 Ariz. 441, ¶ 7 (quoting *State v. Goswick*, 142 Ariz. 582, 586 (1984)). Instead, he assumes the records were "readily discoverable."

¶9 Gutierrez provided no affidavits or other evidence in the trial court suggesting that his trial counsel's failure to investigate and cross-examine the officers concerning their backgrounds fell below reasonable standards. See Ariz. R. Crim. P. 32.7(e). He also cites no authority in his petition for review, nor did he below, showing similar decisions by counsel have been found to constitute ineffectiveness. Accordingly, the court did not abuse its discretion in concluding Gutierrez had failed to establish that his counsel's performance fell below objective standards.

¶10 Moreover, Gutierrez has failed to establish prejudice. His assertion that the jury "would probably" have discredited the officers' testimony if they had heard about their disciplinary records is speculative. See *Rosario*, 195 Ariz. 264, ¶ 23. The trial court therefore did not abuse its discretion in finding Gutierrez's claim of ineffective assistance of counsel was not colorable. See *Martinez*, 226 Ariz. 464, ¶ 6.

¶11 Accordingly, we grant review but deny relief.